OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

May 6, 2003

Mr. Joe R. Tanguma
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P.O. Box 2888
Corpus Christi, Texas 78403-2888

OR2003-3041

Dear Mr. Tanguma:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 180621.

The West Oso Independent School District (the "District"), which you represent, received a request for statements pertaining to an incident involving the assistant superintendent and the principal of West Oso Elementary School that occurred on or about February 11, 2003. You assert the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.135 of the Government Code. Also, you contend Exhibit II is not public information within the purview of the Act. We have reviewed the information you submitted and we have considered your arguments and the exceptions you claim.

Initially, we address your contention that Exhibit II, which contains handwritten notes taken by the District's superintendent, may not be responsive to the request or, in the alternative, does not constitute public information. You explain these notes are not maintained by the District and the District did not require the superintendent to generate these notes. We disagree with the District's contentions and rationale. First, the Act requires a governmental body to make a good faith effort to relate a request for information to the information the governmental body holds. Open Records Decision No. 561 at 8 (1990). Here, the notes are statements that relate to the incident described by the requestor. Therefore, we conclude Exhibit II contains information responsive to the request.

Second, section 552.002 of the Government Code defines public information as "information that is collected, assembled, or maintained under a law or ordinance *or in connection with the transaction of official business*: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." Gov't Code § 552.002 (emphasis added). In Open Records Decision No. 626, this office declared

whether an official who holds records regarding official business has discretion to generate or maintain the records is immaterial. Open Records Decision No. 626 at 2 (1994) (concluding handwritten notes taken during oral interview by Texas Department of Public Safety promotion board members are public information). As you acknowledge in your brief, the notes in Exhibit II pertain to an investigation of the alleged incident at issue. Clearly, the superintendent created the notes "in connection with the transaction of official business." *See id.* Accordingly, we conclude the personal notes of the superintendent are public records subject to the Act.

Next, we address the applicability of your claimed exceptions to the submitted information. Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information made confidential by other statutes. You cite section 551.074 of the Government Code, which states the following:

> (a) This chapter does not require a governmental body to conduct an open meeting:
>
> > (1) to deliberate the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a public officer or employee; or
> >
> > (2) to hear a complaint or charge against an officer or employee.
>
> (b) Subsection (a) does not apply if the officer or employee who is the subject of the deliberation or hearing requests a public hearing.

Gov't Code § 551.074. Based on this provision, you contend the requested documents are confidential by law, stating they pertain to a matter that "*may* be used as part of a pending personnel grievance . . . [and they] *may* be the subject of closed session deliberations by the governing body of the District[.]" (Emphasis added.) Section 551.074 permits the governing body to conduct executive sessions under some circumstances; it contains no confidentiality element. *See* Gov't Code § 551.074. Furthermore, records held by a governmental body are not made confidential merely because they were discussed during an executive session. Open Records Decision Nos. 605 (1992), 485 (1987). Therefore, the District may not withhold the submitted information based on section 552.101 of the Government Code in conjunction with section 551.074 of the Government Code.

Section 552.102 of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the

test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

For information to be protected from public disclosure by the common-law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation.* In *Industrial Foundation,* the Texas Supreme Court stated that information is excepted from disclosure when (1) it contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) the public has no legitimate interest in the information. *Id.* at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Based on our review of the submitted information, we believe the documents do not contain such highly intimate or embarrassing facts as to warrant protection under common-law privacy. Furthermore, the public has a legitimate interest in the statements. *See* Open Records Decision Nos. 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101 or 552.102), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under either the constitutional or common-law right of privacy). Accordingly, the District may not withhold any of the submitted information based on either common-law privacy or section 552.102 of the Government Code.

In relevant part, section 552.103 of the Government Code provides the following:

> (a) Information is excepted from the requirements of Section 552.021 if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.
>
> . . . .
>
> (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

To secure the protection of section 552.103(a), the District must demonstrate the requested information "relates" to pending or reasonably anticipated litigation. Open Records Decision

No. 588 (1991). The District has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing the applicability of section 552.103(a) requires a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.–Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.–Houston [1st Dist.] 1984, writ ref'd n.r.e.).

To establish litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). This office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. Open Records Decision No. 638 at 3 (1996). Further, the mere fact that an individual hires an attorney and the attorney makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

With respect to the first prong, you base your assertion of the litigation exception in part on the fact that an individual involved in the incident to which the submitted information refers has retained an attorney. However, merely hiring an attorney does not provide "concrete evidence" of pending or reasonably anticipated litigation. Open Records Decision No. 361 (1983). Also, we find the conclusory assertions that a subject of the information has filed a grievance with the District and a worker's compensation claim against the District, without further explanation, lack sufficiency to satisfy prong one. Likewise, the District's assertion that an employee has indicated an intention to file assault charges against another employee is insufficient to show that the District reasonably anticipates litigation. Therefore, we conclude the District has not adequately met its burden to establish the applicability of the litigation exception. Thus, the District may not withhold any of the submitted information based on section 552.103 of the Government Code.

Last, section 552.135 states the following:

> (a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

> (b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].
>
> (c) Subsection (b) does not apply:
>
> > (1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or
> >
> > (2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or
> >
> > (3) if the informer planned, initiated, or participated in the possible violation.

Gov't Code § 552.135. Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under this exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See* Gov't Code § 552.301(e)(1)(A). You inform us an individual at issue in the submitted information has indicated in a police report that he intends to file criminal assault charges against another employee of the District. However, the submitted documents do not contain a report of a violation of law by an informer. *See* Gov't Code § 552.135. Furthermore, section 552.135 does not encompass protection for witness statements. Therefore, we conclude the District has not sufficiently demonstrated the applicability of section 552.135 and it may not withhold any information based on this provision.

In summary, the District has not adequately established any of its claimed exceptions apply to the submitted information. Therefore, the District must release Exhibits I and II, in their entirety, to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

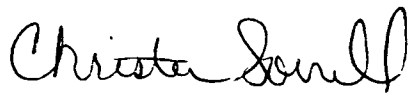
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Christen Sorrell
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CHS/seg

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Enc: Submitted documents

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(w/o enclosures)